Whitney Hatch
Vice President
Regulatory Affairs

GTE

GTE Service Corporation

1850 M Street, N.W., Suite 1200
Washington, D.C. 20036-5801
202 463-5290
Fax: 202 463-5239

March 31, 1997

EX PARTE OR LATE FILED

RECEIVED

APR 1 1997

Federal Communications Commission
Office of Secretary

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W. Room 222
Washington, D.C. 20554

EX PARTE: Telecommunications Services Inside Wiring
CS Docket No. 95-184

Dear Mr. Caton:

Attached for filing in the captioned docket is support for GTE's position that the Commission does not have the authority to limit exclusive contracts between new entrant multichannel video programming distributors and multiple dwelling unit building owners. In accordance with Section 1.1206(b)(1) of the Commission's Rules, two copies of this notice are being filed with the Secretary of the FCC.

Please feel free to call me if you have any questions regarding this matter.

Sincerely,

Whitney Hatch

cc: R. Chessen, R. Dorch, J. Genachowski, M. Jones, J. Kaufman, W. Kennard, J. Logan, J. Lucanik, M. MacBride, J. Nakahata, S. Toller, A. Wallgren

No. of Copies rec'd 0+2
List ABCDE

AN ANALYSIS OF THE FEDERAL COMMUNICATIONS COMMISSION'S JURISDICTION TO PROHIBIT EXCLUSIVE CONTRACTS BETWEEN COMPETITIVE MULTICHANNEL VIDEO PROGRAMMING DISTRIBUTORS AND MDU BUILDING OWNERS

Prepared by
GTE Service Corporation

March 31, 1997

I. SUMMARY

The Commission is considering whether limits should be placed on exclusive contracts between competitive multichannel programming distributors (MVPDs) and multiple dwelling unit (MDU) building owners. For the reasons set forth below, the Commission does not have authority to regulate such private agreements or bar long-term exclusive arrangements between an MDU owner and a competitive MVPD.

The Communications Act ("the Act") does not authorize the FCC to limit an MDU owner's ability to select an exclusive video programming provider. (The 1984 Cable Act provides that cable systems' access to MDUs will be governed by "negotiated agreement between the cable operator and the property owner, and not by legislative fiat as this legislation had provided." 16 Cong. Rec. H10444 (daily ed. Oct. 1, 1984) (statement of Rep. Fields, noting with approval the deletion of Section 633, which would have provided mandatory access). As the Commission and courts have recognized in several contexts, the Act gives the Commission only limited power to regulate competitive multichannel video programmers and private landowners in narrow circumstances not applicable here. ("Our holding that the statute does not mandate giving the cable company access to the building leaves [the] selection [of video programming distributor] to the owner of the property." *Cable*

Investments, Inc. v. Woolley, 867 F.2d 151, 159 (3d Cir. 1989)). While Section 628 of the Act has been mentioned as one possible source of jurisdiction, its plain language does not extend to agreements between landowners and distributors. Furthermore, such a reading of the statute would go well beyond the stated Congressional purpose of ensuring that MVPDs have access to video programming and would be inconsistent with the Commission's own interpretation of Section 628.

Any attempt to prohibit exclusive agreements in this context would also be inconsistent with Commission and judicial precedent on the scope of the FCC's authority. The Commission has consistently rejected arguments that it has jurisdiction over building owners or private property owners -- even where their actions affect telecommunications services to the public. (Restrictive covenants limiting amateur radio operators' ability to erect antennas "are contractual agreements between private parties [and] are not generally a matter of concern to the Commission." *In the Matter of Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities,* 101 F.C.C. 2d 952, 954 (1985). Explaining that pole attachment agreements do not constitute "communication by wire or radio" and "pole owners are not themselves involved in cable transmission at all[,]" the Commission held in 1977 that it lacked jurisdiction over pole attachment agreements between cable companies and utilities. *California Water and Tel. Co., et al.,* 64 F.C.C. 2d 753, 759 (1977).) In such respects, Section 4(i) does not and cannot create jurisdiction where none exists under the Act.

Finally, permitting MVPDs and MDU owners to enter exclusive contracts is not inconsistent with public policy in any event. Where the FCC has clear jurisdiction, the Commission has held that exclusive contracts make sound economic sense and benefit consumers and companies where the communications company has no market power. Exclusive contracts may promote efficient pricing for consumers and can allow new competitors to gain a toehold in an otherwise monopoly market. This is particularly important in the context of cable services, where Congress has expressly recognized the market power of cable incumbent providers and has sought to promote competition through alternative providers. Accordingly, the Commission should not and cannot bar exclusive contracts between competitive MVPDs and private landowners.

II. THE FCC HAS NO JURISDICTION TO INTERFERE WITH EXCLUSIVE CONTRACTS BETWEEN COMPETITIVE MVPDs AND BUILDING OWNERS

A. The FCC's Jurisdiction is Limited By the Authority Found in the Communications Act

It is well established that administrative agencies possess only the power Congress has delegated to them. For example, in *Railway Labor Executives' Ass'n v. National Mediation Board*, 29 F.3d 655, 671 (D.C. Cir. 1994), *cert. denied sub nom., National Railway Labor Conference v. Railway Labor Executives' Ass'n*, 115 S.Ct. 1392 (1995), the D.C. Circuit held that "the extent of [an agency's] powers can be decided only by considering the powers Congress specifically granted it" (quoting *American Fin. Servs. Ass'n v. FTC*, 767 F.2d 957 (D.C. Cir. 1985)). Further, with regard to the FCC, the Second Circuit held in *AT&T v. FCC*, 487 F.2d 865, 872 (2d Cir. 1973) that "[Congress] intended that specific statutory authority, rather than general inherent equity power, should provide [an] agency with its governing standards."[1]

An analysis of the Commission's power to regulate a particular entity or service must begin by examining the scope of the Communications Act. *See* Communications Act of 1934, as amended, 48 Stat. 1064 (codified at 47 U.S.C. §§ 151 et seq.). Though courts have granted the Commission varying degrees of discretion in interpreting its authority under the Act, this latitude does not equate to "untrammelled freedom to regulate activities over which the statute fails to confer, or explicitly denies, Commission authority." *See National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 617 (D.C. Cir. 1976) ("*NARUC*"). Here, the Act does not give the FCC jurisdiction over either cable operators subject to "effective competition" or private landowners. Accordingly, as detailed below, any attempt to prohibit an exclusive contract between competitive MVPDs and property holders would be unlawful and outside the scope of the Act.

B. The Communications Act Does Not Authorize the FCC To Limit An MDU Owner's Ability To Select An Exclusive Video Programming Provider

The FCC has no general jurisdiction over owners of private property or over the terms and conditions of leases they may enter into. Courts have long acknowledged that the rights of landowners and their lessees are governed by the law of the place where the property is located. *See, e.g., Hotz v. Federal Reserve Bank of Kansas City*, 108 F.2d 216 (8th Cir. 1939); *Bowen v. Frank*, 92 N.Y.S.2d 527 (N.Y. Sup. Ct. 1949). Accordingly, state and local

---

[1] Quotation marks and citations omitted.

statutes set out in extensive detail provisions governing landlord-tenant relations. *See, e.g.*, Cal. Civ. Code §§ 1925-1997 (West 1997); N.Y. Multiple Dwelling Law §§ 1-367 (McKinney's 1997); Va. Code Ann. §§ 55-217 to 55-248 (Michie 1995).

Any attempt to regulate private contracts between competitive video providers and private landowners would necessarily divest landowners of certain rights under state law and replace individual choice with administrative mandate. This would not only affect the rights and relationships between lessors and lessees, but also the rights of individual owners in the case of cooperative apartments and condominiums. These state law rights include, among other things, a general right to manage access to property, the protection against unwanted physical invasions, and a right to control the aesthetics of the building and grounds. A prohibition on exclusive contracts would replace the decisionmaking ability of private actors, treading heavily into an area that is a matter of state and local law.

In this context, it is not surprising that Congress has expressly declined to curtail an MDU owner's ability to protect its property interests in the selection of a video provider. A provision that would have mandated access to MDUs by franchised cable operators was contained in the House Commerce Committee's reported version of the Cable Act of 1984, but was removed from the final version and has not been subsequently re-instated. *Compare* H.R. No. 4103, § 633 (1984), *reprinted in,* H.R. Rep. No. 934, at 13 *with* the Cable Communications Policy Act of 1984, Pub. L. 98-549, 98 Stat. 2779 (codified at 47 U.S.C. §§ 521 et seq.). By eliminating this provision, however, Congress has essentially left an MDU owner free to enter into an exclusive contract with an MVPD. Noting with approval the deletion of this provision, Representative Fields commented that the preferred method of protecting and advancing cable television was through "negotiated agreement between the cable operator and the property owner, and not by legislative fiat as this legislation had provided." 16 Cong. Rec. H10444 (daily ed. Oct. 1, 1984) (statement of Rep. Fields).

Federal courts have specifically held that federal law does not give cable television operators a right of access to MDUs against the wishes of the owner. *Cable Investments, Inc. v. Woolley*, 867 F.2d 151 (3d Cir. 1989); *Century Southwest Cable Television, Inc. v. CIIF Associates*, 33 F.3d 1068 (9th Cir. 1994).[2] In *Woolley*, a cable television company brought action against a landlord that refused to allow access to its property, arguing (among other theories) that it had a right of access to the interior of the MDU under the 1984 Cable Act. The cable company had previously offered service to the apartment buildings in question, but a competing MVPD became the exclusive service provider by agreement with the building owner. The Third Circuit rejected the cable company's argument that the Communications Act gave it a right of access, relying on the absence of any express access requirement in applicable federal statutes, and upon Congress' decision to drop Section 633 from the final version of the 1984 Act.[3]

[2] Courts have also declined to find a right to access under the public easement provisions of 47 U.S.C. § 541(a)(2). This provision establishes that any cable franchise granted under the statute be construed to authorize access to public rights-of-way and easements dedicated for compatible uses, but does not mandate access to the interior of dwelling units. *See UACC-Midwest, Inc. v. Occidental Dev., Ltd*, No. 1: 90-CV-383, 1991 US Dist. LEXIS 4163 (W.D. Mich. 1991).

[3] *Woolley*, 867 F.2d at 156, citing *Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.").

Similarly, in *Century Southwest Cable Television, Inc.*, the court held that a landowner that has entered into an exclusive arrangement with a competitive MVPD is not required by the 1984 Act to allow another cable operator to have access to its property. *Century,* 33 F.3d 1071. In both cases, the courts held that federal law leaves the selection of a video programming provider (or providers) solely to an MDU owner. *See Woolley,* 876 F.2d at 159 ("[o]ur holding that the statute does not mandate giving the cable company access to the building leaves that selection to the owner of the property"); *Century Southwest Cable,* 33 F.3d at 1071. Therefore, the Commission has no authority under the 1984 Act to regulate these exclusive arrangements.

Congress has made clear when the Commission can exert jurisdiction over entities or activities -- such as private landowners and private agreements -- that would not otherwise fall within the scope of the Act. For example, Congress specifically amended the Act to give the FCC jurisdiction to require non-licensee tower owners to mark and light antenna structures and subsequently granted it authority to assess forfeiture penalties against such owners in certain circumstances. 47 U.S.C. § 303(q) (granting authority to the Commission to require the lighting and painting of antenna towers and requiring that a tower owner, regardless of its status as a licensee, is primarily responsible for lighting and marking of antenna structures); 47 U.S.C. § 503(b)(5) (permitting the Commission to assess a forfeiture penalty against a nonlicensee tower owner). As discussed below, Congress also explicitly granted the Commission limited jurisdiction over pole attachment agreements reached by cable television operators and utilities. *See* 47 U.S.C. § 224. In the Telecommunications Act of 1996, Congress gave the Commission authority to regulate private agreements (such as restrictive covenants and lease provisions) that restrict a viewer's ability to use small dish satellite receivers and broadcast TV antennas. *See* Telecommunications Act of 1996 § 207, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151 et seq.) (hereinafter "Telecommunications Act of 1996" or "1996 Act"); *see also* 47 C.F.R. § 1.4000; *In the Matter of Implementation of Section 207 of the Telecommunications Act of 1996: Restrictions on Over-the-Air Reception Devices*, 11 FCC Rcd 6357, 6359 (1996) (addressing the restrictions prohibited by Section 207).[4] Unlike these contexts, which are inapplicable to the circumstance at issue, the Communications Act does not provide any basis for regulating landowners' exclusive contracts with competitive video providers.

C. The Act Does Not Give the FCC Authority Over Competitive Cable Providers

The Commission has no authority to regulate generally the activities of competitive cable providers. Although Title VI of the Act provides the Commission with some limited authority over competitive cable operators in specific situations,[5] none of these provisions even arguably allows the Commission to assert the power to regulate private agreements entered into by competitive MVPDs. Any attempt to weave a broad jurisdictional basis from these threads of regulatory authority would be precisely the type of statutory overreaching

[4] Prior to this new authorization, FCC regulations had applied only to state and local laws concerning signal receivers and did not address private agreements. *See In re Preemption of Local Zoning and Other Regulation of Receive-Only Satellite Earth Stations,* 51 Fed. Reg. 5519 (1986).

[5] *See, e.g.,* 47 U.S.C. § 531 (public, educational and government channels); 47 U.S.C § 532 (leased access); 47 U.S.C. § 533 (ownership restrictions); 47 U.S.C. § 534 (must carry requirements); 47 U.S.C. § 535 (noncommercial channel carriage requirements).

forbidden by the courts in *AT&T* and *NARUC*. *See AT&T*, 487 F.2d at 872-73; *NARUC*, 533 F.2d at 617-18.

In particular, the rate regulatory scheme enacted by Congress in the 1992 Cable Act, the statutory provision that most arguably permits the Commission to regulate exclusive contracts of this type, clearly supports the conclusion that the Commission may not exercise authority over agreements between competitive cable providers and building owners. *See* 47 U.S.C. § 543(a)(2). Expressing a clear preference to "rely on the marketplace," Congress enacted Section 623 of the Act, which specifically precludes the Commission and local franchising authorities from regulating the rates of operators subject to "effective competition." 47 U.S.C.A. § 521 Note (b)(2); H.R. Conf. Rep. No. 862, at 51 (1992), *reprinted in,* 1992 U.S.C.C.A.N 1231, 1233; S. Rep. No. 92, at 18 (1992), *reprinted in*, 1992 U.S.C.C.A.N 1133, 1151 ("It has been the longstanding policy of the Committee to rely, to the maximum feasible extent, upon greater competition to cure market power problems; however, the evidence demonstrates that there is no certainty that such competition to cable operators with market power will appear . . . soon."); *Id.* at 63, 1992 U.S.C.C.A.N. at 1196 ("[r]ate regulation is permitted only in the absence of effective competition").

If the FCC were to regulate exclusive contracts, it would be inserting itself squarely into the market by affecting where competitive cable providers offer service, including rates, terms and conditions associated with these offerings.[6] A prohibition on exclusive contracts

---

[6] Indeed, a "fresh look" policy as applied to existing exclusive contracts between incumbent cable operators and landowners would be a permissible and potent means to ensure "reasonable" cable rates under Section 623 of the Act by operators not subject to "effective competition." To this end, a "fresh look" policy will meet the goals of Section 623 by
(Continued...)

would effectively restrict a competing provider's ability to offer efficient pricing options based on its ability to recover costs over a sufficient period of time, thereby compelling the provider to either raise its price or bear the risk that these costs would go unrecovered. This is precisely the regulation of competitive marketing arrangements that Congress intended the FCC to avoid.

The D.C. Circuit Court of Appeals has already rebuked Commission attempts to broaden its authority over competitive MVPDs. In *Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995), *cert. denied,* 116 S.Ct. 911 (1996), the court concluded that the FCC's "uniform rate structure" and "tier buy-through" regulations as applied to cable operators facing "effective competition" contradict the "plain language, structure and legislative purpose" of the 1992 Cable Act. *Time Warner*, 56 F.3d at 151. "Absent a requirement of uniformity . . . a cable operator would be free to charge [ ] different rates as the market would bear or uniform rates. In either event, the choice would be that of the operator, not the Commission." *Id.* at 191. The court also explained that application of such rules to providers facing "effective competition" would "undermine[] a hallmark purpose of the 1992 Cable Act: to allow market forces to determine the rates charged by cable systems that are subject to 'effective competition' as defined by Congress." *Id.*

(...Continued)
allowing MDU owners to reevaluate exclusive contracts with incumbent cable operators, thereby allowing market forces to ensure reasonable cable rates for consumers and increased choice in programming.

D. Section 628 of the Communications Act Does Not Expand the Commission's Jurisdiction Over Competitive MVPDs To Reach Private Agreements With Landowners

The plain language of Section 628(b) clearly does not authorize the Commission to regulate exclusive arrangements between competitive MVPDs and private landowners. Section 628(b) provides that cable operators, vertically integrated satellite cable programming vendors and satellite broadcast programming vendors may not "engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any [MVPD] from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." 47 U.S.C. § 548(b).[7] On its face, this provision deals exclusively with cable operators preventing other MVPDs from gaining access to programming.[8] It does not prevent arrangements that enable competitive MVPDs to compete for customers.

The statutory purpose embodied in subsection (a) of Section 628 supports this reading. Congress clearly sought to ensure access to programming. Specifically, Section 628(a) provides that a purpose of this Section is to "increase competition and diversity in the multichannel video programming market." 47 U.S.C. § 628(a). In addition, Congress also found that Section 628 should "increase the availability of [satellite programming] to persons

---

7 Nothing in the language of Section 628(b) would apply in any event to non-cable MVPDs or their exclusive contracts. Thus, it is illogical to assert that Congress was concerned about MDU contracts because it otherwise excluded an entire set of known competitors from this provision.

8 Section 628(c) prohibits certain "exclusive contracts" between cable operators and satellite programming vendors, but certainly does not address contracts with end user customers.

in rural and other areas not currently able to receive such programming" and to "spur the development of communications technologies." 47 U.S.C. § 548(a). While these purposes relate generally to MVPDs, none addresses the relationship between MDUs and competitive MVPDs.

The Commission's own past analysis of Section 628 also confirms this reading of Section 628. In adopting rules to implement Section 628, the Commission explained that Congress "expressed its concern that potential competitors to incumbent cable operators often face hurdles when attempting to gain access to the programming they need" to provide a "viable and competitive multichannel alternative." *In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 3359, 3362 (1993). Further, when discussing the proper coverage of its rules, the Commission noted that the program access requirements of Section 628 "have at their heart the objective of releasing programming to the existing or potential competitors of traditional cable systems so that the public may benefit from the development of competing distributors." *Id.* at 3365.[9]

---

[9] This interpretation is also in keeping with the Commission's enforcement of complaints brought under Section 628(b). See *Hutchens Communications, Inc. v. TCI Cablevision of Georgia, Inc.*, 9 FCC Rcd 4849 (Cable Services Bur. 1994). Though the Bureau ultimately dismissed this complaint because it found that the petitioner did not "fall within the statutory definition of a multichannel video programming distributor," the Bureau explained that "Section 619 of the Act [Section 628 of the Communications Act] is designed to protect *competing distributors* from anticompetitive behavior by vertically integrated programming vendors and/or *incumbent cable operators*." *Id.* at 4852-53 (emphasis added). Accordingly, the Commission should not now read beyond the language and explicit purpose stated in Section 628 to conclude that it has jurisdiction over private matters that ultimately do not harm an MVPD's access to programming or competition within the market for multichannel video programming.

Though the FCC elsewhere noted the potentially broad scope of Section 628(b), it did so in the context of discussing its authority to adopt regulations "to accomplish the statutory objectives" if there emerged new barriers to the "broader distribution of satellite cable and broadcast video *programming*." *Program Access First Report and Order*, 8 FCC Rcd at 3374 (emphasis added). Furthermore, the Commission went on to state that a complaint brought under Section 628(b) must demonstrate that the "purpose or effect" of the conduct was to "'hinder significantly or to prevent any multichannel video programming distributor *from providing satellite cable programming or satellite broadcast programming* to subscribers or consumers." *Id.* (emphasis added).[10] Therefore, because the regulation of exclusive contracts falls outside these narrowly defined statutory objectives, Section 628(b) does not create a broad right of MVPDs to gain access to private property.

E. A Rule Limiting a Landowner's Ability to Enter Into Exclusive Contracts with MVPDs is Inconsistent With the Purpose of the Telecommunications Act of 1996

A prohibition on exclusive contracts between property owners and new MVPD entrants is flatly inconsistent with the deregulatory purpose and structure of the Telecommunications Act of 1996. The 1996 Act sets forth a regulatory framework that encourages competitive entry and seeks to end the monopoly provision of video services by incumbent cable operators.

---

[10] It is also significant to note that, although the program access rules have been the subject of a number of adjudicatory proceedings before the FCC since 1992, each case has involved conduct relating to *video programming*. For example, cases have involved petitions for public interest determinations to permit exclusive distribution agreements between cable systems and satellite programming vendors. *See, e.g.*, *In the Matter of Cablevision and Sci-Fi Channel,* 9 FCC Rcd 4849 (1994); *In the Matter of Newschannel*, 10 FCC Rcd 691 (1994); *In the Matter of Time Warner Cable*, 9 FCC Rcd 3221 (1994).

See, e.g., Telecommunications Act of 1996 § 302 (to be codified at 47 U.S.C. § 573) (open video systems). Congress explained that the purpose of the 1996 Act is "to provide for a pro-competitive, de-regulatory, national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications . . . by opening all telecommunications markets to competition." H.R. Conf. Rep. No. 104-458, at 1 (1996).

To this end, the Commission should seek to eliminate new regulations on competitive providers where possible, rather than imposing new restrictions that will ultimately impair their ability to compete effectively. Competitive MVPDs require the *option* to enter into exclusive contracts with building owners -- as incumbent providers have had in the past -- so that the new service offering can be financially viable for the new entrant. The upfront expenses associated with providing competitive services are significant for many new entrants with limited financial resources. A prohibition on exclusive contracts can deny them a reasonable opportunity to recover this investment, thereby possibly preventing them from offering service to MDUs. The FCC should not curtail one of the few tools a new entrant has to enter the market, which is essential when competing with the market power enjoyed by incumbent cable operators. Only then can a robust, competitive market for video services develop as envisioned by Congress.

F. The FCC Has Authority Under Section 623 of the Act to Apply a "Fresh Look" Policy to Existing Contracts Between Incumbent Cable Operators and MDU Building Owners

In contrast to lack of jurisdiction over exclusive contracts involving competitive MVPDs (*i.e.* those subject to "effective competition"), the Commission has authority pursuant to Section 623 of the Communications Act to adopt a "fresh look" policy towards *existing* exclusive contracts entered into by incumbent cable operators not subject to "effective competition." Section 623 of the Act provides explicit authority for the FCC to ensure "reasonable rates" for basic cable services and related equipment, and requires that any such regulations "achieve the goal of protecting subscribers" where "effective competition" is not present. 47 U.S.C. § 543(b). Furthermore, Congress gave the Commission "authority to choose the best method of ensuring reasonable rates" under Section 623(b). *See* H.R. Rep. No. 862, at 62 (1992), *reprinted in,* 1992 U.S.C.C.A.N. 1231, 1244.

Permitting MDU owners to take a "fresh look" option to choose a competitive provider is clearly within the Commission authority under Section 623. Such agreements were made at a time when incumbent cable operators were not subject to effective competition from other providers, contain rates set in a monopoly environment, and the perpetual duration of many of these agreements anticompetitively precludes new MVPDs from competing for these subscribers. Therefore, the FCC would be clearly within the scope of its authority to ensure other MVPDs can place competitive pressure on these existing rates by allowing MDU owners to take a "fresh look" at existing contracts.

III. IN OTHER RELATED AREAS, THE FCC HAS REPEATEDLY RECOGNIZED LIMITATIONS ON ITS JURISDICTION, ABSENT A CLEAR STATUTORY DIRECTIVE, EVEN WHERE THERE WAS A DEMONSTRABLE IMPACT ON COMMUNICATIONS SERVICES

The Commission itself has recognized the limitations on its authority even where an activity had a clear impact on communications. *See In the Matter of California Water & Tel. Co., et al,* 64 F.C.C. 2d 753 (1977) ("*California Water & Tel. Co. Memorandum Opinion & Order*"); *see also In the Matter of Investigation of Television Interference to be Caused by the Construction of the World Trade Center,* 10 R.R. 2d 1769 (Aug. 7, 1967) (informal views of

Commissioner Lee noting that the "Commission has no authority to regulate the proposed construction" of the World Trade Center in New York City). Indeed, the FCC has explained that its "powers cannot be extended beyond the terms and necessary implications of the Act" to regulate pole attachment agreements between cable companies and other utilities (*California Water & Tele. Co. Memorandum Opinion and Order,* at 758-60) or to reach activities such as the construction of private buildings (*In re Complaint of Illinois Citizens Comm. for Broadcasting,* 35 F.C.C. 2d 237, *aff'd sub nom., Illinois Citizens Comm. for Broadcasting v. FCC,* 467 F.2d 1397 (7th Cir. 1972)).

Along these lines, at least one court has agreed with the Commission's conclusion that the Communications Act does not grant jurisdiction over all activities that "substantially affect communications." *Illinois Citizens Comm.*, 467 F.2d at 1399-1400. For example, in *Illinois Citizens Committee,* the FCC readily concluded that it did not have authority under the Communications Act to regulate the construction of the Sears Tower, even though the construction might affect television reception. *In re Complaint of Illinois Citizens Comm.*, 35 F.C.C. 2d 237 (1972). Acknowledging its otherwise broad statutory authority, the Commission dismissed a petitioner's argument that any structure which "may affect" radio reception is subject to the FCC's jurisdiction as a "leap beyond logic." *Id* at 238. In affirming the Commission's refusal to assert jurisdiction, the Court of Appeals for the Seventh Circuit explained that the Commission correctly rejected petitioner's "affecting communications" argument, which would expand the FCC's authority "to include a wide range of activities, whether or not actually involving the transmission of radio or television signals much less being remotely electronic in nature." *Illinois Citizens Comm.*, 467 F.2d at 1400.

Similarly, the Commission has declined to exercise regulatory authority over private contractual agreements that restricted amateur radio operators' ability to erect antennas and other communications equipment. *In the Matter of Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities*, 101 F.C.C. 2d 952 (1985). While sustaining a challenge to state and local ordinances restricting the placement of antennas, the Commission declined to consider the petitioner's challenge against restrictive lease provisions, explaining that since "these restrictive covenants are contractual agreements between private parties, they are not generally a matter of concern to the Commission." *Id.* at 954.[11]

The Commission also has concluded that it lacked jurisdiction over pole attachment agreements between cable companies and utilities, absent an explicit grant of authority from Congress. *California Water and Tel. Co., et al.*, 64 F.C.C. 2d 753 (1977) (noting that "[i]f broader powers [are] desirable they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions") (citing *FTC v. Raladan Co.*, 283 U.S. 643, 649 (1930)). The Commission explained that pole attachment agreements do not constitute "communication by wire or radio[,]" and that such a service is "simply rental of available pole or conduit space, and the pole owners are not themselves involved in cable transmission at all." *Id* at 759. In response to the Commission's conclusion, Congress intervened and amended the Communications Act to provide explicitly for such jurisdiction, noting its specific intent to

---

[11] As noted above, the Commission has relied on Section 207 of the 1996 Act to preempt both regulations and private covenants that restrict the use of over-the-air-reception devices, though some question remains as to the Commission's authority to apply this Section to MDU restrictions. *See Implementation of Section 207 of the Telecommunications Act of 1996*, 3 (Continued...)

resolve the "jurisdictional impasse" over the regulation of pole attachment disputes. *See* S. Rep. No. 95-580, at 14 (1978), *reprinted in*, 1978 U.S.C.C.A.N 109, 122.[12]

In addition, the actions of Congress in the context of non-licensee tower owners support the conclusion that the FCC must find a clear basis for jurisdiction in the Act. Concerned over the fact that "'abandoned towers' . . . do not appear to fall within the Commission's jurisdiction to compel continued marking or lighting," *see* H.R. Rep. No. 1014, *reprinted in,* 1965 U.S.C.C.A.N. 3598, 3599, Congress added Section 303(q) to the Act to give the FCC such explicit authority over non-licensees. *See* Pub. L. No. 89-268, 79 Stat. 990 (codified at 47 U.S.C. § 303(q)) (tower owners must maintain the painting and/or illumination as prescribed by the Commission "[i]n the event that the tower ceases to be licensed by the Commission for the transmission of radio energy"). Subsequently, when it was unclear whether the FCC could impose a forfeiture against a non-licensee owner, Congress modified the Act to extend authority to the agency. *See* Pub. L. No. 102-538, 106 Stat. 3533 (codified at 47 U.S.C. § 503 (b)(5)) (extending the FCC's forfeiture authority for violations of Section 303(q) to a "nonlicensee tower owner who has previously received notice

---

(...Continued)
Com. Reg. 1308, 1330 (1996) (*FNPRM*).

12 The Committee also noted that Section 224 "strictly circumscribes" the FCC's jurisdiction to narrow circumstances. S. Rep. No. 95-580, at 15-16, *reprinted in,* 1978 U.S.C.C.A.N. 109, 123-24. The 1996 Act also expanded the scope of the pole attachment rules to cover attachments by all providers of telecommunications services, not only cable systems, and made minor adjustments to the processes used to set rates. *See* Telecommunications Act of 1996 §§ 224(a)(4), (e)-(i). These modifications do not alter the fact that the requirements apply only to property owned or controlled by utilities, defined to include local exchange carriers and electric, gas, water, steam and other public utilities. Accordingly, these provisions do not authorize the FCC to impose obligations on parties other than those enumerated in Section 224(a)(1), and certainly not on private landowners.

of the obligations imposed by [that Section]"). Accordingly, these cases make clear the fact that Congress must provide explicit authority for the Commission to act, and the Commission is not free to create jurisdiction where none exists.

IV. SECTION 4(i) OF THE COMMUNICATIONS ACT PROVIDES NO BASIS TO REGULATE EXCLUSIVE CONTRACTS

The FCC cannot rely upon Section 4(i) to serve as the basis for asserting jurisdiction over MDU owners and MVPDs in these circumstances. 47 U.S.C. § 154(i) ("[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions"). It is well-established that the FCC cannot assert jurisdiction solely on the basis of Section 4(i) where no other authority exists, *AT&T v. FCC*, 482 F.2d 865, 876-77 (2nd Cir. 1973) (holding that Section 4(i) did not authorize the FCC to require AT&T to request prior authorization before filing a revised tariff), or where such action would be otherwise inconsistent with the Act. *North American Telecomm. Ass'n v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985). Section 4(i) is not "infinitely elastic," and allows the FCC flexibility only "to the extent necessary to regulate effectively those matters already within [its] boundaries." *Id.* Thus, Section 4(i) permits the FCC to fill the interstitial gaps in its established regulatory scheme as necessary to achieve congressionally mandated goals.

Courts have enforced the limits on the FCC's exercise of jurisdiction pursuant to Section 4(i). *See, e.g. AT&T v. FCC*, 487 F.2d 865; *Telecommunications Research. & Action Center*, 836 F.2d 1349, 1361 (D.C. Cir. 1988) (rejecting FCC's claim that it had inherent authority under Section 4(i), and other sections, to conduct lotteries in ITFS licensing proceedings and noting that the FCC could not ignore conditions Congress had placed on that authority). Further, in at least one instance, the FCC has itself recognized that its authority under Section 4(i) cannot be used to exceed its Congressional mandate. *See In re Application of Radio Station WSNT*, 45 F.C.C. 2d 377, 382 (1974), *aff'd sub. nom., Turner v. FCC,* 514 F.2d 1354, 1355 (D.C. Cir. 1975). In rejecting the argument that its 4(i) authority extended to the award of attorney's fees, the Commission noted that "[w]e believe that a specific congressional mandate would be required to justify [an] order [awarding attorneys' fees]." *Id.* at 382.

Under the circumstances at hand, then, the FCC can not use 4(i) as a jurisdictional basis for regulating MDU/MVPD contracts because such regulation would be inconsistent with the statutory scheme created by Congress. The imposition of limits on an MDU owner's ability to enter into long-term, exclusive agreements with MVPDs is not a "matter already within [the FCC's] boundaries," *see North American Telecomm. Ass'n*, 772 F.2d at 1292, and is directly inconsistent with the FCC's authority.

In a recent case, the D.C. Circuit held that the FCC had authority under Section 4(i) and its auction statute to charge a personal communications service ("PCS") licensee a $3 million auction-based fee. *Mobile Communications Corporation of America v. FCC*, 77 F.3d 1399 (1996) (*"Mtel"*). However, the *Mtel* decision arose from a substantially different factual context and, accordingly, does not shed any new light on the Commission's 4(i) authority here.[13] First, the *Mtel* case involved the parameters of the FCC's pioneer preference rules, an

---

13 Furthermore, the D.C. Circuit's decision in *Mtel* is hardly free from doubt. In a forceful dissent, Chief Judge Edwards wrote that "[c]haritably speaking, the [Commission's] (Continued...)

FCC creation. The question of the FCC's ability to grant pioneer preferences was never at issue in that case. In a careful analysis of the FCC's licensing procedures and recent Congressional enactments, the court held that, notwithstanding the absence of explicit statutory authorization for this charge on Mtel, the FCC's action was "not inconsistent" with the language and structure of the Communications Act. *Mtel*, 77 F.3d at 1405-6. Regulation of exclusive contracts between MDU owners and MVPDs, however, is directly inconsistent with the FCC's authority and, therefore, would not satisfy long-standing precedent or *Mtel*. Furthermore, *Mtel* involved the rights of a licensee and the FCC's authority to place conditions on that license -- a power resting clearly and solely with the FCC. In contrast, exclusive arrangements between landowners and competitive MDU owners are subject to state law and have been left by Congress to the landowner's discretion. *See* Section II.B. above.

V. THE FCC IN OTHER CONTEXTS HAS REPEATEDLY FOUND THAT EXCLUSIVE CONTRACTS BENEFIT BOTH CARRIERS AND CUSTOMERS.

Even where the FCC has a jurisdictional basis for regulating exclusive contracts, it has been reluctant to disrupt these private contracts, and has instead expressly permitted them to remain in force. Moreover, the Commission has recognized the benefits of such arrangements to both carriers and customers where they have been negotiated in a competitive environment.

A. Long-Term Transponder Leases

(...Continued)
argument is something akin to the FCC saying that it has the power to do whatever it pleases merely by virtue of its existence." *Mtel*, 77 F.3d at 1413 (quotation marks and citations omitted).

The FCC has chosen not to limit the ability of common carriers to enter into long-term leases for space on satellite transponders. The provision of transponder space on domestic satellite systems is a communications service subject to tariff under Section 203 of the Act. Accordingly, the FCC has general Title II authority over contracts involved in satellite transponder leases. *See generally,* Title II of the Communications Act. The Commission has not limited the ability of satellite owners to enter into long-term or exclusive arrangements with its customers. In fact, parties commonly enter into leases for transponder space for long time periods, sometimes up to 10 years.

Long-term transponder leases have been challenged by parties on a number of grounds and the FCC has subjected them to close scrutiny. The FCC has not found, however, that the long duration of these leases is somehow improper under its rules, and has instead recognized the benefits of allowing carriers the flexibility to structure leases that meet their customers' needs. In one instance, the FCC noted that privately negotiated contracts between carriers and customers "generally, in the absence of market power, conclude in a more efficient bargain than that which our regulatory process would artificially impose." *RCA American Communications*, 84 F.C.C. 2d 353, 358 (1980), *modified, In the Matter of RCA American Communications*, 86 F.C.C. 2d 1197 (1981), *aff'd, RCA American Communications, Inc. v. FCC,* 731 F.2d 996 (D.C. Cir. 1984) (affirming satellite carriers' ability to reasonably adjust the rates and duration of transponder leases).

B. Long-Term and Exclusive Contracts for Telecommunications Services

In its rulemaking initiated in 1979 concerning rates and facilities authorizations for competitive carrier services, the FCC recognized the benefits that negotiated contracts, including long-term and exclusive contracts, could bring to carriers and customers in the increasingly competitive telecommunications marketplace. *In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services,* 77 F.C.C. 2d 308, 337 (1979) ("*Competitive Carrier Rulemaking*"). These contracts, which contained varying rates and terms, were acceptable to the Commission because "absent market power, price differentials should generally reflect only competitive forces at work." *Id.*

The analysis in the *Competitive Carrier Rulemaking* can be analogized to the video programming distribution context. The FCC should allow competitive MVPDs freedom to negotiate long-term, exclusive or other special contracts, for the same reasons it allowed competitive carriers a degree of freedom to enter special contracts with customers. This ability to negotiate special contracts is essential where new entrants seek to break into markets dominated by monopolists.

VI. CONCLUSION

The Commission should not embark on an effort to search the Communications Act in the hopes of locating a statutory basis for regulating arrangements between landowners and competitive video service providers. While the Commission clearly has authority to adopt a "fresh look" policy as a means of ensuring reasonable rates charged by cable operators with market power, the Communications Act fails to give the FCC authority to regulate the exclusive contracts of competitive MVPDs. Indeed, the Commission has itself concluded that its jurisdiction is not without bounds, particularly in the context of issues relating to private property. Therefore, any attempt to open the record to consider this issue will only delay full implementation of competitively neutral inside wiring rules and impair the growth of meaningful competition to cable incumbents.